SERVED: July 18, 2002

NTSB Order No. EA-4984

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of July, 2002

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. TILAK S. RAMAPRAKASH, Respondent.	Docket SE-15534

ORDER DENYING RECONSIDERATION

Respondent has petitioned for "rehearing, reargument, and reconsideration" of Board Order No. EA-4947, served February 11, 2002. The Administrator has replied in opposition. We deny the petition.

The petition essentially reiterates arguments previously considered, establishes no error in our original decision, and offers no reason to order a new hearing. As we explained in our original decision, we decline to extend the stale complaint rule under these circumstances, i.e., where the "delay" is non-prejudicial to respondent's ability to defend against the charges (having admitted all factual allegations) and accrued, essentially, because the Administrator chose to delegate her resources in a manner that would not immediately, but eventually, detect airmen's non-compliance with a mandatory reporting requirement that respondent admits to not adhering to.[1]

[1] As we also explained, our decision here is consistent with precedent on this very issue, see Administrator v. Ikelar, NTSB Order No. EA-4695 (1998), but we have nonetheless placed the

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's request for reconsideration is denied.

BLAKEY, Chairman, CARMODY, Vice Chairman, and BLACK, Member of the Board, concurred in the above order. HAMMERSCHMIDT and GOGLIA, Members, did not concur, and Member GOGLIA submitted the following dissenting statement, in which Member HAMMERSCHMIDT joined.

Good cause exists for favorable reconsideration.

First, the plain language of the stale complaint rule requires dismissal of the complaint. This case is clearly within the rule. It is brought more than six months after the date of the violation. It does not allege that the airman lacked qualifications. The stale complaint rule requires that if the Administrator does not show good cause for the delay then the law judge ***shall dismiss*** the allegations. 49 CFR 821.33(a)(1). This rule does not contain any requirement that the Respondent has the burden to establish that the Administrator's delay was prejudicial to Respondent's case. The record is devoid of any showing of good cause. The administrative law judge found that the Administrator sat on the evidence that he had for 264 days before filing a complaint. The Administrator has not shown good cause. Administrator v. Brea, NTSB Order No. EA-3657 (1992).

Second, the only reason for the delay is that the Administrator had other priorities, or there was inefficiency within the Administrator's control. If the delay is within the Administrator's control, good cause does not exist. The Board has previously decided this issue in Administrator v. Booth, NTSB Order No. EA-2697 (1988). The language of that Opinion is equally applicable here; "on this Appeal the Administrator does not argue that the heavy workload and the office move established good cause for delay in advising the respondent of this proposed certificate action against him. We agree with his apparent decision to abandon

(..continued)
Administrator on notice that in future cases we will look more closely at the time that elapses between the time the Administrator could have, but did not, learn of the violation by comparing readily-available evidence. As we inferred in our original decision, however, this analysis, and our continued adherence to Ikelar, will depend on the specific facts of future cases and arguments pertaining to the stale complaint rule.

that contention for we think it unlikely that such administrative, housekeeping matters could ever fairly be found to constitute good cause under Rule 33, since they ordinarily would rarely involve factors beyond the Administrator's control. It would be anomalous indeed if, under a rule designed to benefit airman (sic) by forestalling prejudicial delay in the prosecution of certificate actions, the Administrator could defeat dismissal by showing in effect that he has initiated more cases than he could properly manage." *See also* Administrator v. Carter, NTSB Order No. EA-3730 (1992). (The complaint was dismissed when certificate action was brought more than six months after the alleged violation.) *See also* Administrator v. Zanlunghi, 3 NTSB 3696 (1981). (The complaint was dismissed as being prosecuted beyond the limitation of the stale complaint rule.)

The Ikelar case is distinguishable from this case and does not provide the support that the decision states it does:

*First, the FAA received the NDR tape with Ikelar's name on it over one year after the motor vehicle action (from 09/08/95 to 10/07/96). The FAA received the NDR tape with Respondent's name on it less than three months after the motor vehicle accident (from 02/25/97 to 05/16/97).

*Second, a month elapsed between the time when the FAA completed processing and review of the NDR tape and sent it to investigations from when it received the NDR tape (from 10/07/96 to 11/08/96). Only three days elapsed between the time the FAA completed processing the NDR tape with Respondent's name and sent it to a special agent from when it received the NDR tape (from 5/16/97 to 5/19/97).

*Third, Ikelar's case was sent to one special agent and not transferred to any other, who then proceeded as expeditiously as possible on investigating the matched names. Respondent's case was first sent to one agent on 05/19/97. Apparently, no investigation or work on Respondent's information was performed before being transferred to a second agent on 09/16/97, almost four months later. The work was again transferred over one month later to a third special agent on 10/27/97, again without any investigation or work having been apparently performed.

*Fourth, the special agent was in the midst of investigating matches on three other tapes with 636 matched names when the tape with Ikelar's name was assigned to him or her. After completing investigations on those 636 names, the special agent performed an NLETS query on Ikelar on 01/10/97, little more than

eight weeks after it was assigned on 11/08/96. The third special agent that was assigned the tape with Respondent's name was in the midst of investigating two other tapes with 202 matched names. She performed an NLETS query on Respondent on 02/04/98, almost fourteen weeks after it was assigned to her on 10/27/97.

*Fifth, after receiving a positive result from the NLETS query, the agent requested paper records from Colorado the same day, on 01/10/97. The agent did not receive the paper records until 02/10/97, one month later. After receiving the paper records, the agent sent an LOI to Ikelar and received his response on 02/18/97, one week after preparing the LOI. The agent investigating Respondent prepared an LOI and received Respondent's response 03/05/98, one month after completing the NLETS inquiry.

*Sixth, after receiving Ikelar's response to the LOI on 02/18/97, the agent then completed an EIR and sent it through the ranks for review. A notice of Proposed Certification Action was issued on 03/17/97, less than four weeks later. In this case, the agent received his response to the LOI on 03/06/98 but a Notice was not issued until 04/22/98, almost seven weeks later.

This decision seems to establish the dangerous precedent that so long as the Administrator proceeds with due diligence after she discovers the violation, she may wait an indefinite amount of time (11 months and one week in this case) to discover that violation and save her complaint from the stale complaint rule. By permitting the Administrator to prevent the clock from tolling until she affirmatively acts on a possible violation, the decision allows the Administrator to circumvent the stale complaint rule in a fashion similar to that it forestalled in Rothbart and Vorhees, 6 NTSB 1561 (1990), reconsideration denied, 7 NTSB 1066 (1991). In that case, the Board stated that the Administrator may not avoid the stale complaint rule merely by alleging a lack of qualification. To so allow would result in an expansion of the lack of qualification exception to the point of eradicating the stale complaint rule. Now, according to the decision in this case, the Administrator need only put the alleged violation to the side until she is ready and able to handle the case since it is only once she affirmatively begins to investigate does the clock begin to run.

The stale complaint rule creates a presumption that a delay of more than six months from the time of an alleged FAR violation to the issuance of a NPCA "prejudices a respondent in the presentation of his defense to the charges leveled by the Administrator." Brea, EA-3657 at 4 (1992). See also Parish, 3 NTSB 3474

(1981). By definition, "presumption" is indicative of that which is pre-determined and not subject to interpretation by factual circumstances. It is a protection put into place by procedure and by principles of fairness. It is inappropriate then, in this case to allow the Administrator to escape accountability under the Board's stale complaint rule because "a respondent's ability to defend against a charge [in fact] has not been compromised by the passage of time" or because of the "importance" of this violation over any other in the FAR.

In Ikelar, only 66 days elapsed between the date that the FAA Security Division matched National Driver Registry records with records from the FAA's Civil Aeronautical Institute. In this case there were 264 days that elapsed between the time of the Administrator's receipt of the NDR tape and the action taken. The Ikelar decision provides no precedent for any determination that the Administrator had "good cause" for the delay in this case. Ikelar itself is inconsistent with Board precedent that upheld the stale complaint rule requiring the Administrator to take action within six months of the date of the violation. If the Administrator needs more time to conduct computer matches of the state DUI records with the pilot name records and initiate action, then the Administrator must propose a change in the rule rather than ignoring the rule. However, the pilots and the public would be better served if the Administrator provided a little additional information about this reporting requirement at the time of the annual pilot medical exam because at least one recent Respondent believed that reporting his DUI conviction to the FAA's CAMI office satisfied his reporting requirement.

The footnote referencing the Ikelar case misses the mark because it erroneously suggests that the six month period commences when the Administrator "learns" of the violation, instead of from the "date" of the violation, as stated in the stale complaint rule. The footnote also misses the mark because it suggests that it is the time period after the end of the six month period that will be scrutinized instead of the actions of the Administrator. In order to constitute good cause the Administrator will have to demonstrate extraordinary efforts to expedite the processing of the complaint. It will not be sufficient to claim that the extra time was somehow similar to the extra time that may have been permitted to the Administrator in any other stale complaint rule case. It is the wrong standard to apply, and it is unfair to airmen, to

suggest that the Board is “warning” the FAA by stating in effect that “we will let this one go, but don’t do it again”.

The stale complaint rule requires the Administrator to maintain discipline in the discharge of enforcement responsibilities. The majority opinion here emasculates the regulation that is intended to maintain professional standards.